FILE COPY

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,

Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

APPELLANTS' REPLY BRIEF

JACK GREENBERG
NORMAN C. AMAKER
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama 35203

Attorneys for Appellants

IN THE

Supreme Court of the United States

October Term, 1968

No. 908

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,

Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

APPELLANTS' REPLY BRIEF

I

In their brief, appellees state that unlike the Louisiana Constitutional Amendment requiring the administration of an "interpretation and understanding" test as a means of disfranchising black voters in that State, the voiding of which was affirmed by this Court in *Louisiana* v. *United States,* 380 U.S. 145 (1965), Title 30 §21 of the Alabama Code has not been shown to have been adopted for the purpose of racial discrimination (Appellees' Brief p. 5). However, there are notable similarities dating back to the Alabama Constitutional Convention of 1901 which adopted the present Alabama Constitution, between the historical evolution of that Louisiana Constitutional provision and the jury provision in suit here, similarities which lead in-

evitably to the conclusion that the "integrity, good character and sound judgment" provision of the Alabama jury selection statute was likewise adopted as a means of barring blacks from jury service.

The 1901 Alabama Constitutional Convention like the constitutional conventions of other southern states held during that era, e.g., the Louisiana Convention of 1898 (*Louisiana* v. *United States, supra*), the Mississippi Convention of 1890 which adopted the Mississippi Constitution (*United States* v. *Mississippi*, 380 U.S. 128, 131-32 (1965)), was primarily concerned with maintaining white control and domination of the state's public affairs. Instructive are the remarks of the Convention's president, John Knox, in his opening address to the delegates:

> And what is it that we do want to do? Why, it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this State. *Journal of the Constitutional Convention of Alabama*, 1901, p. 9 (The Brown Printing Company, 1901)
>
> • • •
>
> . . . if we would have white supremacy, we must establish it by law—not by force or fraud. *Journal of the Constitutional Convention of Alabama*, 1901, p. 12 (The Brown Printing Company, 1901)

Establishment of white supremacy by law principally meant control of the ballot[1] but also encompassed the matter of

---

[1] "I submit it to the intelligent judgment of this Convention that there is no higher duty resting upon us, as citizens and as delegates, than that which requires us to embody in the fundamental law such provisions as will enable us to protect the sanctity of the ballot in every portion of the State.

The justification for whatever manipulation of the ballot that has occurred in this State has been the menace of negro domination." Opening Remarks of President Knox, *Journal of*

jury selection and service; each was seen as a necessary means of maintaining white political control in the State. Thus, during the course of the Convention's proceedings, an ordinance was proposed by one of the delegates seeking to restrict jury service in the State to whites as well as to prevent Negroes from holding public office:

> Ordinance 174, by Mr. Sollie:
>
> Be it ordained by the people of Alabama, in Convention assembled; that no person shall be eligible to hold any public office *or to serve as a juror* in Alabama who does not belong to the white race, and who is not descended exclusively from the white race, and who is not at the time of his election or appointment to such office and has not been for at least one year immediately prior thereto a citizen of the United States and of Alabama. *Journal of the Constitutional Convention of Alabama,* 1901, p. 141 (The Brown Printing Company, 1901) (Emphasis added.)

There was also a resolution introduced during the Convention to the same effect:

> Resolution No. 53, by Mr. Henderson:
>
> Resolved, that the new Constitution provide that no

---

the Constitutional Convention of Alabama, 1901, p. 12 (The Brown Printing Co. 1901)

President Knox then discussed the various means employed by other southern states in drafting their constitutions "to protect the sanctity of the ballot" against Negroes. What was finally agreed on by the delegates was a provision similar to that adopted by Louisiana and North Carolina requiring an applicant for voting registration to be able to "read and write any article of the Constitution of the United States in the English Language." The reason for this provision was, "that while in effect, it will exclude the great mass of ignorant Negro voters, it does not, in terms, exclude them . . ." *Journal* p. 15.

This, apparently, was the *modus operandi* subsequently used by the Alabama legislature in setting qualifications for jury service.

person of African descent shall hold office in this State, except as a teacher in the public schools of his race; *nor shall any such person be drawn to serve as a juror in the courts of this State.*

Journal of the Constitutional Convention of Alabama, 1901, p. 98 (The Brown Company, 1901) (Emphasis added.)

Though there is no record of the action taken by the Convention on either of these proposals, it is clear that the deliberations of the Convention with its stated purpose of maintaining white supremacy set the tone for the later enactment by the Alabama legislature of the law respecting jury service involved here. As one writer, in a recent publication, has stated on the basis of his research and investigation:

> . . . Alabama's statute on the subject was deliberately vague and verbose. During the Constitutional Convention of 1901, the political leaders of Alabama had bluntly stated their goal: "to secure permanent white supremacy in this State. . . ." Out of the convention and the legislative sessions that followed came a law which limited jury service to all male citizens between the ages of twenty-one and sixty-five. Habitual drunkards, the physically disabled, and anyone "convicted of any offense involving moral turpitude" could not serve. One provision barred illiterates, but allowed their names if they were freeholders. *The most crucial section in the law closed the jury box to all men except those "generally reputed to be honest and intelligent" and "esteemed in the community for their integrity, good character and sound judgment. . . ."* Had the law been fairly enforced, there would have been few objections, but as a native Alabamian and noted Southern lawyer admitted, these vague laws were nothing

more than a mask for excluding the names of any and all Negroes.

Carter, *Scottsboro* (Louisiana State University Press, 1969) pp. 196-197 (footnotes omitted) (Emphasis supplied.)

This conclusion is inescapable in view of the State's history and the atmosphere pervading the Constitutional Convention and is entirely consistent with what the Convention had done with respect to the Constitution's voting provision (see note 1 *supra*).

II

Appellees also say in their brief that there is no nexus between racial exclusion and the vague statutory standards of Title 30 §21 because in point of fact the standards were never applied to the consideration of prospective Negro jurors in Greene County (Appellees' Brief, pp. 5, 6). However, this Court in *Whitus* v. *Georgia*, 385 U.S. 545, 552 (1967) condemned the "opportunity for discrimination" presented by Georgia's system of juror selection, and in our brief we pointed out that, in the absence of objective juror selection standards, jury commissioners have the opportunity to discriminate on the basis of their assumption of black racial inferiority (Brief for Appellants, p. 24). If a statute permits, as does Alabama's, the use of discretion in selecting the names of prospective jurors, then there is no difference either in motivation or in result whether the qualifications of Negroes are not considered at all[2] or whether, when considered, they are excluded because in the subjective judgment of the jury selectors

[2] "The Jackson County (Alabama) official finally admitted that Negroes were not excluded for any particular reason because 'negroes was never discussed.'" Carter, *op cit.*, p. 196.

they simply don't measure up to the standards required by statute. If men believe that other men are inferior, it is natural for them not to consider their qualifications because they're believed to have none. But, unmistakably, what permits these feelings to function in such a way as to achieve the result of exclusion from jury service is the absence of a statute "objectively applicable *and* objectively applied." Note, 52 Va. L. Rev. 1069, 1151. It is for this reason that the relief granted by the district court was insufficient because requiring the qualifications of Negroes to be considered is not a solution to the problem of exclusion based on racial feelings when consideration would only mean a continuation of the exclusion because of those same feelings.

The only real solution is to require resort to a source or sources of names sufficiently complete to provide a representative jury selection and to require selection from the source or sources on an objective basis. Increasingly, courts confronted with claims of racial discrimination in jury selection have directed jury selectors to the scheme adopted by Congress in the Jury Selection and Service

Act of 1968 as an appropriate means of guaranteeing both these necessary elements in the jury selection process.[3]

Respectfully submitted,

JACK GREENBERG
NORMAN C. AMAKER
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama 35203

Attorneys for Appellants

[3] See, e.g., *Love* v. *Gant*, CA No. 13,263 (W.D. La.)—(pending on court's suggestion that jury selection plan approved by Judicial Conference for Fifth Circuit pursuant to the Act be adopted for Bienville Parish, La.). At least one state court has also forbade the use of subjective standards in the selection of jurors (see *Wonnum* v. *Haygood*, CA No. 2463 (M.D. Ga.)—opinion filed August 11, 1969, p. 6 referring to action taken by Upson County, Georgia Superior Court).